No. 321

IN THE

Supreme Court of the United States

OCTOBER TERM 1945

PETER A. BUHL, LESTER W. BLUHM, ABEL A. GARFAIN, ISADORE LUPER, HARRY I. HOROWITZ, IRVING C. ROSENBERG, NATHAN ROSENZWEIG, CHARLES B. SALINGER, IRVING N. SOLOWAY and HARRY W. WEINERMAN, on behalf of themselves and all other licensed podiatrists and chiropodists in the State of New York, similarly situated,

Petitioners,

—against—

THE UNIVERSITY OF THE STATE OF NEW YORK, THOMAS J. MANGAN, WILLIAM J. WALLIN, ROLAND B. WOODWARD, WILLIAM LELAND THOMPSON, JOHN LORD O'BRIAN, GEORGE HOPKINS BOND, OWEN D. YOUNG, SUSAN BRANDEIS, C. C. MOLLENHAUER, W. KINGSLAND MACY, JOHN P. MYERS and STANLEY BRADY, as members of the Board of Regents of the University of the State of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

JACOB W. FRIEDMAN,
Attorney for Petitioners.

INDEX

Table of Cases Cited:

Other Authorities Cited:

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT, THIRD DEPARTMENT, OF THE STATE OF NEW YORK

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Peter A. Buhl, Lester W. Bluhm, Abel A. Garfain, Isadore Luper, Harry I. Horowitz, Irving C. Rosenberg, Nathan Rosenzweig, Charles B. Salinger, Irving N. Soloway and Harry W. Weinerman, on behalf of themselves and all other licensed podiatrists and chiropodists in the State of New York, similarly situated, respectfully pray for a writ of certiorari to the Appellate Division of the Supreme Court, Third Department, of the State of New York, the highest court of the State in which a decision could be had, to review a determination of that Court, rendered on December 29, 1944, affirming a judgment and order of the Supreme Court, Albany County, New York, which judgment and order granted judgment for the respondents and dismissed the complaint of the petitioners, in an action for a declaratory judgment involving the power of the Board of Regents of the University of the State of New York, to promulgate and enforce a certain regulation concerning the practice of podiatry.

Statement of Matters Involved

This action was instituted for a declaratory judgment, decreeing the rights of the petitioners, all duly licensed podiatrists in the State of New York, under the provisions of law as set forth in Article 53 of the Education Law of the State of New York, and particularly with respect to Regulation #1 promulgated by the respondents and its enforcement; restraining the respondents from publishing and circulating the said Regulation #1; directing the respondents to cancel and annul the said Regulation #1; that the petitioners have the right to use the title "Doctor" or "Dr." with the qualification "podiatrist" or "chiropodist" and enjoining the respondents from disciplining petitioners and all other podiatrists and chiropodists similarly situated by reason of the use by them of the title "Doctor" or "Dr." with the qualification "podiatrist" or "chiropodist."

The position of the petitioners is that the respondents had and have no power under the provisions of the Education Law to enact such regulation; that such regulation violated and is contrary to the provisions of Article XIV of the Constitution of the United States in that it deprived the petitioners of a right and property without due process of law, and that it was discriminatory in denying the petitioners the equal protection of the laws.

The regulation under attack is as follows (R. 12, 21):

> "1. Fraud and deceit. Fraud and deceit in the practice of podiatry under the Education Law shall include the following:
>
> a. The use of the title 'doctor' with or without the qualification 'podiatrist' or 'chiropodist' by a licensed podiatrist unless he has earned the decree of doctor of podiatry or doctor of chiropody in accordance with the provisions of Section 1402 of the Education Law; the use by any podiatrist or chiropodist authorized to practice under the Education Law of New York State of the title 'doctor' or any abbreviation thereof without the qualification 'podiatrist' or 'chiropodist.'"

Section 1402 of the Education Law of the State of New York states (so far as is pertinent here):

> "Sec. 1402—Examinations
>
> No person shall engage in the practice of podiatry in this State except as hereinafter provided, unless he shall have been duly licensed to practice as provided by law."

Petitioners instituted action for a declaratory judgment, as above set forth, in the Supreme Court, Albany County, State of New York. The constitutional question involved

was asserted there (R. 15) but judgment was granted the respondents, dismissing the petitioners' complaint. Opinion of Court (R. 23).

From such judgment and order (R. 6, 8) petitioners duly appealed to the Appellate Division of the Supreme Court, Third Department, State of New York (R. 4), where the constitutional question involved was again pressed. The judgment and order appealed from were affirmed (R. 32, 34). Application was made to said Appellate Division for leave to appeal to the Court of Appeals, but such application was denied (R. 36). Application was then duly made to the Court of Appeals for leave to appeal to that Court, and such application was denied by that Court (R. 38). Accordingly the Appellate Division of the Supreme Court, Third Department, State of New York, was the highest court of the State of New York, in which a decision could be had.

As indicated above, the constitutional question was presented in the petitioner's complaint (R. 15), and pressed in the lower Court and in the Appellate Court, as is shown by the language in the opinion of Mr. Justice Bliss of the Appellate Division (R. 31).

Question Presented

Is Regulation #1 defining "fraud and deceit" as set forth in Section 1412 of the Education Law of the State of New York (R. 13-14) in so far as it prohibits petitioners, all duly licensed to practice podiatry and chiropody, from using the title "Doctor" or "Dr." with the qualification "podiatrist" or "chiropodist," and subjecting them to disciplinary action involving the revocation, suspension or annulment of the license and registration of a podiatrist, in contravention of the Constitution of the United States, Amendment XIV, Section 1?

Reasons for Allowance of Writ

1—The determinations of the Courts of the State of New York, upholding the validity of the regulation under attack, are repugnant to the provisions of the Constitution of the United States, Article XIV, Section 1, granting all persons the equal protection of the laws. They determine, that although the Education Law of the State of New York makes no such distinction, the Board of Regents may discriminate against licensed podiatrists who have no academic or collegiate degree of "doctor of podiatry" or "doctor of chiropody."

2—The determinations of the Courts of the State of New York, upholding the validity of the regulation under attack, are repugnant to the provisions of the Constitution of the United States, Article XIV, Section 1, that no State shall deprive any person of any right or property without due process of law. The Education Law of the State of New York does not prohibit duly licensed podiatrists from using the title "Doctor" or "Dr." qualified by "podiatrist" or "chiropodist", and the Board of Regents cannot create such prohibition, and thus deprive petitioners of a right without due process of law.

WHEREFORE your petitioners pray that a writ of certiorari issue to the Appellate Division of the Supreme Court, Third Department, State of New York, commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the record of all proceedings of said Appellate Division of the Supreme Court, Third Department, State of New York, had in this cause, to the end that this cause may be reviewed and determined by this Court; that the determination of the Appellate Division of the Supreme Court, Third Department,

State of New York, be reversed, and that petitioners be granted such other, further and different relief as may seem proper.

Dated, New York, August 10, 1945.

JACOB W. FRIEDMAN,
Attorney for Petitioners.

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Respondents.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Supreme Court, Appellate Division, Third Department of the State of New York, is officially reported in 268 App. Div. 530. A copy of such opinion is annexed to the certified record filed herein (R. 27).

Jurisdiction

The determination of the Appellate Division of the Supreme Court, Third Department, State of New York, now sought to be reviewed was rendered on December 29, 1944 (R. 32, 34); The said Appellate Division denied petitioners' application for leave to appeal to the Court of Appeals, State of New York (R. 36); and the Court of Appeals denied petitioners' application for leave to appeal on May 17, 1945 (R. 38).

The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code as amended, otherwise known as 28 U. S. C., Section 344, Subdivision b.

Statutes Involved

The subject Regulation #1 promulgated by the Board of Regents, and the Sections of the Education Law of the State of New York, are as follows:

"Regulation #1

1. Fraud and deceit. Fraud or deceit in the practice of podiatry under the Education Law shall include the following:

a. The use of the title 'doctor' with or without the qualification 'podiatrist' or 'chiropodist' by a licensed podiatrist unless he has earned the degree of doctor of podiatry or doctor of chiropody in accordance with the provisions of Section 1402 of the Education Law; the use by any podiatrist or chiropodist authorized to practice under the Education Law of New York State

of the title 'doctor' or any abbreviation thereof without the qualification 'podiatrist' or 'chiropodist.'"

Section 1402 of the Education Law of the State of New York (as it is applicable herein):

"Section 1402. Examinations.

No person shall engage in the practice of podiatry in this state except as hereinafter provided, unless he shall have been duly licensed to practice as provided by law."

Section 1412 of the Education Law of the State of New York (as far as applicable) is as follows:

"Any person who shall present to any county clerk for the purpose of registration, any license which has been fraudulently obtained, or shall obtain any license under this article by any false or fraudulent statement or representation, or shall aid and abet in the practice of podiatry within the state without conforming to the requirements of this article, or shall otherwise violate or neglect to comply with any of the provisions of this article, shall be guilty of a misdemeanor, and shall on conviction, for each and every offense be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for a term of not less than thirty days and not more than one year or by both fine and imprisonment. Any person who shall practice podiatry under a false or assumed name or shall falsely personate another practitioner or former practitioner of a like or different name, shall likewise be guilty of a misdemeanor and punished accordingly.

1. The license and registration of a podiatrist may be revoked, suspended or annulled, or such podiatrist, reprimanded, censured or otherwise disciplined in accordance with the procedure prescribed by this article upon proof that such podiatrist

(a) Has been convicted of a felony;

(b) Has been guilty of fraud or deceit in practice or in securing admission to practice;

(c) Is an habitual drunkard or addicted to the use of morphine, opium, cocaine or other drugs having a similar effect;

(d) Has undertaken or engaged in any practice beyond the privileges and rights accorded to him in his license;

(e) Has practiced without annual registration;

(f) Has employed, hired, procured or induced a person not licensed to practice podiatry in this state to so practice;

(g) Has aided or abetted in the practice of podiatry a person not licensed to practice podiatry in this state;

(h) Has been guilty of untrue, fraudulent, misleading or deceptive advertising;

(i) Has advertised for patronage by means of handbills, posters, circulars, stereopticon slides, motion pictures, radio or newspapers; or any other printed publications or mediums; or by means of flamboyant or large display or glar-

ing or flickering signs; or by means of any sign containing as part thereof any representation of the human foot or leg or appliance or any method of treatment;

(j) Has been guilty of unprofessional conduct."

Statement of the Case

A summary statement of the case and of the argument is set forth in the petition and the index.

Specification of Errors To Be Urged

The errors to be urged are identical with the reasons for the allowance of the writ as set forth in the foregoing petition.

ARGUMENT

The regulation under attack is contrary to and violates the provisions of the Constitution of the United States, Article XIV, Section 1 in that:

a—Deprives the petitioners of a right and of property without due process of law, and

b—Denies to the petitioners the equal protection of the laws and discriminates against them individually and as a class.

Concededly, the Legislature of the State, if it saw fit, could enact provisions prohibiting the use of the title "doctor" or "Dr." qualified by "podiatrist" or "chiropodist" by all persons even though they be duly licensed to practice

such profession, but even the Legislature cannot have any right to make distinctions among the licensees by permitting one group of them the use of such title and prohibiting another group from the use thereof, basing such distinction upon the possession of an academic or collegiate degree.

That the use of the title "doctor" or "Dr." qualified by "podiatrist" or "chiropodist" (as distinguished from the academic or collegiate degree) is a valuable asset cannot be gainsaid. In the language of the common man the title "doctor" connotes a qualification and distinction which is lacking where such title is not present. That the petitioners are all properly and duly licensed by the State of New York would be beside the question so far as the prospective patient is concerned. In his mind the title "doctor" or "Dr." as a prefix to the name of the practitioner, would act as a halo and the absence thereof would be a positive detriment to one not permitted to use the title—although having the same qualifications and passing through the same ordeal in order to be licensed. Nor is the scope of practice of a licensee enlarged by the use of the title "doctor".

It must be borne in mind that before 1943 the academic or collegiate degree of "doctor of podiatry" did not exist, yet the State deemed the petitioners qualified to take the examination and then license them and such licenses have been registered and renewed and are now in full force and effect.

The Constitution of the State of New York provides as follows:

(Rights, Privileges and Franchises Secured)

Section 1: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges

secured to any citizen thereof unless by the law of the land or the judgment of its peers."

(Equal Protection by Law; Discrimination and Civil Rights Prohibited)

Section 11. "No person shall be denied the equal protection of the laws of the state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation or institution, or by the state or any agency or any subdivision of the state."

These provisions stem from Amendment XIV, Section 1, of the Constitution of the United States, the pertinent portion of which is as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of right, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Not only do the foregoing constitutional provisions prohibit, enjoin and prevent the Legislature itself from adopting and passing discriminatory legislation but necessarily they are with equal force applicable to an administrative body, such as the Board of Regents. Concededly an administrative body may regulate in the interest of public welfare and morals, but such regulation must be within the framework of the constitution, and the basic law from which it stems.

Accordingly, insofar as a licensed podiatrist is prohibited from using the title "doctor" or "Dr." qualified by "podiatrist" or "chiropodist" by reason of his lacking the academic or collegiate degree of "doctor of podiatry," his liberty is restricted and his capacity to earn fees is lessened, and he is denied the equal protection to which he is entitled. *Smith* v. *State of Texas,* 233 U. S. 630.

Concededly, the State may in the exercise of its police power and in the interests of health, morals, safety or welfare of the community pass legislation to preserve such interest, and within such limits.

Can a person *licensed* to practice podiatry endanger such interest by using the title "doctor" or "Dr." qualified by "podiatrist" or "chiropodist" simply because he did not have the academic or collegiate degree of "doctor of podiatry"? Conversely are such interests protected by permitting a *licensed* podiatrist to use the title "doctor" or "Dr." merely because he has the collegiate or academic degree of "doctor of podiatry" or "chiropody"?

It thus appears that the regulation passed by the Board of Regents has no reasonable relation to the licensed podiatrists. It has the added vice of drawing distinction between licensees. Such distinction must not be arbitrary, capricious or discriminatory. *Wormsen* v. *Moss,* 177 Misc. 19, 29 N. Y. S. (2) 798; *Avon Western Corporation* v. *Wooley,* 39 N. Y. S. (2) 653 (not officially reported).

A regulation within the provisions of law, must be reasonable, and must operate with substantial equality and uniformity on all licensed podiatrists.

> "The constitutional requirement of the equal protection of the law undoubtedly permits a wide range of discretion in classifying both persons and things, and the requirement is not violated so long as persons and things similarly situated are similarly treated. But the classification must not be arbitrary and must rest upon some ground of difference having a substantial and reasonable relation to the accomplishment of a legitimate public object." *Russo* v. *Morgan,* 174 Misc. 1013, 21 N. Y. S. (2) 637; *Avon Western Corporation* v. *Wooley* (*supra*).

The regulation here involved unlawfully invades the right of every one of the petitioners, all duly licensed podiatrists. So that even if the Legislature itself had enacted such a discriminatory provision it would be the duty of the Court to declare it invalid, and be held unconstitutional and void.

This matter involves the rights of every podiatrist licensed before 1943, the year when the collegiate or academic degree of "doctor of podiatry" was first conferred. There are over 1200 of these licentiates, whose constitutional rights and privileges have thus been invaded. Every one of them, by being licensed, has been recognized by the State of New York as fully qualified to practice his profession; yet every one of them is being discriminated against and deprived of a right, not by Legislative enactment—even though that would be unlawful—but by the circuitous regulation adopted and enforced by the Board of Regents. The Legislature could not grant to an administrative board or quasi judicial tribunal, such as the Board of Regents is, power to create such discrimination or deprive the petitioners of a constitutional right. *Cherry* v. *Board of Regents,* 289 N. Y. 148.

CONCLUSION

For the reasons stated above, the application for a writ of certiorari should be granted.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioners.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Table of Cases Cited:

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE

The courts of New York State have each refused to petitioners the right to call themselves "doctors" when they are not (R. 23). Their opinions represent the unanimous affirmance by the Appellate Division of the court of original jurisdiction (R. 32, 34), the unanimous refusal

of that court to grant an appeal to the Court of Appeals (R. 36), and the unanimous refusal of the Court of Appeals to permit an appeal to that body (R. 38). Briefs were filed by both parties on each of these proceedings. No one of the petitioners has completed a course in a college or in a professional school which would entitle him to call himself "doctor".

The provisions of the Education Law of the State of New York (§66) make it a misdemeanor for any person with intent to deceive, to falsely represent himself to have received any such degree or credential and further states:

> "nor shall any person append to his name any letters in the same form registered by the regents as entitled to the protection accorded to university degrees, unless he shall have received from a duly authorized institution the degree or certificate for which the letters are registered."

The petitioners claim that they have heretofore called themselves "doctors". If they have done so it is in violation of this section of the New York State law.

The rule of the Regents, adopted at the request of the Podiatry Society of this State, specifically prohibiting podiatrists from using the title "doctor" unless through education they were entitled so to do is set forth in the brief for the petitioner. It is the position of the Regents that such use without the training is deceitful and fraudulent.

As in all professions, the Legislature has from time to time increased the requirements for admission. In 1912, only one year of high school was required of podiatrists; in 1913, two years of high school; 1919, three years; 1921, four years. In 1923 a professional course of one year of at least eight months was required. In 1929 this was raised to a two-year professional course. In 1940 two years of college were added and the professional course lengthened

to three years. This latter course resulted in the awarding of the doctorate. This meant that after 1940 no person could qualify for a license unless he had completed the work leading to a doctor's degree. The petitioners all were licensed under regulations in effect prior to that time. Their academic and professional qualifications vary but they are all short of training which entitled them to hold doctors' degrees. They could, of course, obtain such training by making up their deficiencies in a recognized school.

POINTS

I.

There is no constitutional question involved.

We must confess that we are unable to discover where there is any constitutional question here involved. Under the provisions of the law in this State the petitioners herein involved never had any legal right to call themselves "doctors". Consequently, they never secured any property right, if such be a property right. The fact that they were licensed to practice podiatry never gave them the right to call themselves "doctors".

The only legal way that a person may utilize the title "doctor" in this State is to secure such degree from a recognized school of learning. The reason for this is too evident to merit much discussion. The use of the term "doctor" conveys to the public the implication that the user has the training which entitles him to use this term. The public understands that the medical schools of this State give an extensive training before a person can receive that title and for any one who has not had the training to hold himself out as having had it is fraudulent and deceitful.

The practice of podiatry, sometimes called "chiropody", is defined in the Education Law of the State of New York (§1401, subd. 5) as follows:

"the diagnosis of foot ailments and the practice of minor surgery upon the feet limited to those structures of the foot superficial to the inner layer of the fascia of the foot, the palliative and mechanical treatment of deformities and functional disturbances of the feet, but it shall not confer the right to treat communicable or constitutional diseases of the bones, ligaments, muscles or tendons of the feet or any other part of the body, or to perform any operation on the bones, ligaments, muscles or tendons of the feet involving the use of any cutting instrument or the right to use any anaesthetics other than local."

The people who have been licensed to perform this minor medical service heretofore have had far less training than that required of a doctor. If a person has had the training which a doctor of Podiatry receives it can be expected that he will be fully familiar not only with the limited field ascribed by statute to the podiatrists (or chiropodists) but that he will have general knowledge of blood circulation and many other things. Consequently, when a patient visits a podiatrist and he holds himself out by the use of the title to be a doctor, the patient may well expect of him a broad knowledge, which he does not have if he has not had the training required of a doctor. The reason for the rule of the Regents is quite apparent. It is in the interest and for the protection of the public.

A person who fails to take sufficient courses to qualify him to be a doctor or a person who takes such courses and who fails either in the courses or in the examinations and hence has not achieved the right to call himself "doctor" is not discriminated against because others are able to achieve that right. This would be a queer diagnosis of the process of education if by court fiat both those persons who complete the courses and those who did not must be given the same recognition.

It is claimed that because of the fact that some people with training can achieve the title of "doctor" and some

through lack of training have not been successful in obtaining that rank, two classes are created and that this creates "class legislation". There certainly is a fundamental basis for each and there is no constitutional prohibition thereto.

Cotting v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 110.

Welch Co. v. *New Hampshire*, 306 U. S. 79.

It is a familiar rule of this Court that there is nothing to prevent the establishment of classes if the statute or regulation establishing the same is not arbitrary or capricious.

New York Rapid Transit Corporation v. *City of New York*, 303 U. S. 573.

Packer Corporation v. *State of Utah*, 285 U. S. 105.

Bayside Fish Flour Co. v. *Gentry*, 297 U. S. 422.

People v. *Saltis*, 328 Ill. 494, appeal dismissed 277 U. S. 575.

St. Louis Union Trust Co. v. *State*, 155 S. W. 2d 107, certiorari denied, 314 U. S. 700.

All employment is based upon standards of education and it certainly is not arbitrary or capricious that there be different standards of education. The only distinction between the two classes as claimed by the petitioner here is the difference in training. Those without the training can step into the next class by obtaining it. As a matter of fact, over 226 podiatrists have accomplished just that since the Legislature raised the standards. They now have completed the necessary courses and hold doctors degrees. Petitioners want theirs without so doing. Not having been successful through court action, they caused a bill to be introduced into the 1944 Legislature to accomplish the purposes. (See S. Bill Int. 663; Pr. No. 725; Assembly Bill, Int. 961; Pr. No. 1027). The Legislative Committees

on Education rejected the proposal and the bill never received any consideration.

Where the qualifications for professional licensure or employment in a particular field have been increased and the right of persons already practicing or employed is continued there is no constitutional infringement notwithstanding that persons who might have been licensed or employed at or prior to the time of the change in qualifications were thereafter precluded unless they complied with the new requirements. (*Sperry Hutchinson Co.* v. *Rhodes,* 220 U. S. 502; *Dent* v. *State of West Virginia,* 129 U. S. 114; *Watson* v. *State of Maryland,* 218 U. S. 173; *Williams* v. *Walsh,* 222 U. S. 415; *People* v. *Griswold,* 213 N. Y. 92.)

The petitioners are not denied the right to practice podiatry. Their licenses have been issued and they are practicing. The regulation challenged here in no way affects the right of petitioners to practice podiatry. The regulation under attack by the petitioners tends to guard against deception and fraud. It is a valid exercise of authority as this Court pointed out in *Dent* v. *West Virginia,* supra, when it said:

> "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud."

CONCLUSION

For the reasons stated above the application for a writ of certiorari should not be granted.

Respectfully submitted,

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